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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 237

LAR DALY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

AND

FEDERAL COMMUNICATIONS COMMISSION,

Respondent-Intervenor.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO REMAND TO THE COURT OF APPEALS FOR DECISION ON THE MERITS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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FEDERAL COMMUNICATIONS COMMISSION,

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PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO REMAND TO THE COURT OF APPEALS FOR DECISION ON THE MERITS.

Petitioner prays that this Honorable Court reconsider its order of October 14, 1957, denying Petitioner's request for certiorari, and upon reconsideration to take jurisdiction and hear this case or, in the alternative, to remand this case to the United States Court of Appeals for the Seventh Circuit for a decision on its merits.

The following are the reasons in support of this Petition:

I.

GROUNDS WHICH ARE CONFINED TO INTERVENING CIRCUMSTANCES OF SUBSTANTIAL OR CONTROLLING EFFECT."

A. A Legal Article Written About Petitioner's Case.

A legal article about Petitioner's case entitled "Lar Daly and the Constitution" was written by Howard Newcomb Morse, Of Counsel in this Petition for Rehearing. This legal work sets forth an original theory of Constitutional Law, of magnitude in its influence and effect, bearing directly upon Petitioner's rights under the law. This legal article is incorporated herein and made an integral and substantial part hereof.

LAR DALY AND THE CONSTITUTION.

by Howard Newcomb Morse
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On March 7, 1957 a final order was handed down by the United States Court of Appeals for the Seventh Circuit dismissing the case of *Lar Daly v. United States of America and Federal Communications Commission*, in which case the petitioner sought a declaratory judgement. On April 2, 1957 a petition for a rehearing was denied. Daly was refused free and equal radio and television time as a

legally qualified candidate for President of the United States by the "Big Four" networks (the National Broadcasting Company, the Columbia Broadcasting System, the American Broadcasting Company and the Mutual Broadcasting System) and the Federal Communications Commission. He was certified as a legally qualified candidate by the duly constituted authorities of the States of Illinois, Indiana and Montana, and this fact was known to the four networks and the Federal Communications Commission before he was denied free and equal broadcast time.

Free and equal broadcast time is guaranteed by section 315 of the Communications Act of 1934, as amended, which refers specifically to "equal opportunities." It is axiomatic that for one to be deprived of said "equal opportunities" constitutes a denial of the basic freedom of equal justice under law. Due to the procrastination and dilatory tactics employed by the Federal Communications Commission, by the time Daly was given his day in court the election had passed and the Court held that his case was non-justiciable and accordingly moot.

Article I, section 4, clause 1, of the Constitution of the United States of America reads as follows: "The Times, Places and *Manner* of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing (sic) Senators." This writer will subsequently prove that the proviso following the semicolon may never be used by the Congress or any of its created federal regulatory agencies, such as the Federal Communications Commission, due to the conditions under which the States of South Carolina, New Hampshire, New York and Rhode Island and Providence Plantations ratified the Constitution of the United States.

Article II, section 1, clause 2, which provides for the choosing of Presidential electors, adopts as the arbiter of the *manner* in which Presidential electors may be chosen the same arbiter in Article I, section 4, clause 1, of the *manner* in which Senators and Representatives are chosen —the state legislatures. Since the same arbiter is employed in both provisions—the provision pertaining to the choosing of Senators and Representatives and the provision referring to the choosing of Presidential electors—after it is established that the Congress or any of its created federal regulatory agencies cannot supersede or supplant the arbiter in the former provision, by the same token the Congress or any of its created federal regulatory agencies would be estopped from legally superseding or supplanting the same arbiter in the same general sphere of activity—elections and the elective process.

As to the Court's holding that the case was non-justiciable and therefore moot, the decisions in the cases of *Van DeVegt* v. *Board of Commissioners of Larimer County*, 98 Col. 161, 177, 55 P. 2d 703, 710 (1936); *Peppers Refining Company* v. *Corporation Commission*, 198 Okl. 451-453, 179 P. 2d 899, 901 (1947); *Culver* v. *City of Warren*, 84 Ohio App. 373, 391, 392, 396, 83 N. E. 2d 82, 90, 92 (1948), and *California Company* v. *State Oil and Gas Board*, 200 Miss. 824, 845, 27 So. 2d 542, 547 (1946), all hold that a case is never moot "* * * where interests of a public character are asserted." Certainly, no one can maintain that Daly was not asserting his interests and that those interests were not of a public character.

A federal court has the legal duty incumbent upon it to recognize and follow the settled substantive law of the state in which the case before it arose. The Appellate Court of Illinois in 1944 in Appeal of *Frank Foundries Corporation*, 323 Ill. App. 594, 600, 56 N. E. 2d 649, 652, declared that: "* * * if a substantial issue or question

remains in the case, the cause is not moot." Certainly, whether the guarantee of "equal opportunities" in section 315 of the Communications Act of 1934, as amended, is merely "window dressing" and a "dead letter" remains a substantial issue or question.

Since the Court dismissed the case as moot, contrary to Illinois law and its legal obligation to recognize and follow the settled substantive law of Illinois as laid down by an Illinois appellate court, and did not decide the case on its merits, this writer would now like to summarize briefly the merits of the case. Daly was guaranteed "equal opportunities" under section 315 of the Communications Act of 1934, as amended, by virtue of being certified as a legally qualified candidate for President of the United States by the duly constituted authorities of the States of Illinois, Indiana and Montana. But he was denied said "equal opportunities" by a Congressionally-created federal regulatory agency which had both actual and constructive notice that he was a legally qualified candidate before depriving him of his rights under the law.

The question as to which sovereignty—the several states or the United States—is the arbiter as to who is a legally qualified candidate is resolved by that fact that the question as to who is a legally qualified candidate comes under the generic constitutional heading of *manner* of choosing such public officers as Senators, Representatives and Presidential electors and by the further fact that the Constitution reserves to the several states the role of arbiter of said *manner*. However, under the proviso of Article I, section 4, clause 1, the proposition might be advanced that the Congress, acting through one of its created federal regulatory agencies, could exercise its purportedly delegated prerogative to "* * * by law (section 315 of the Communications Act of 1934, as amended) make or alter" the *manner* established by state law of choosing the foregoing

public officers so as to arrogate unto the United States the role of arbiter of said *manner*. But it will be seen that the proviso was rendered nugatory as a result of the terms upon which the States of South Carolina, New Hampshire, New York and Rhode Island and Providence Plantations were admitted into the United States.

South Carolina's condition subsequent as embodied in her ratification of May 12, 1788 is in these words: "And whereas, it is essential to the preservation of the rights reserved to the several States, and the freedom of the people, under the operations of a General Government, that the right of prescribing the *manner*, time, and places of holding the elections to the Federal Legislature, should be forever inseparably annexed to the Sovereignty of the several States,—This Convention doth declare, that the same ought to remain, to all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the General Government."

When South Carolina's ratifying convention passed her ratification containing this condition subsequent, all but six of the original thirteen states had previously ratified the Constitution, all without this condition subsequent. Since the seven states already members of the United States accepted South Carolina as a member, they assented to South Carolina's condition subsequent. Such assent thereupon operated so as to make South Carolina's condition subsequent apply to each and every one of the seven states as forcefully as it applied to South Carolina.

The next state to enter the United States, New Hampshire, came into the United States on the following condition subsequent as contained in her ratification of June 21, 1778: "That Congress do not exercise the powers vested in them, by the fourth section of the first article, but in cases when a State shall neglect or refuse to make the regulations therein mentioned."

Since the eight states already members of the United States accepted New Hampshire as a member, they assented to New Hampshire's condition subsequent, which was the same type of condition subsequent which already applied to all eight. The next state to enter the United States was the Commonwealth of Virginia. After Virginia came New York. New York's condition subsequent as embodied in her ratification of July 26, 1788 is in these words: "That the Congress will not make or alter any regulation in this State, respecting the times, places, and *manner*, of holding elections for Senators or Representatives, unless the Legislature of the State shall neglect or refuse to make laws or regulations for the purpose, or from any circumstance, be incapable of making the same; and that in those cases, such power will only be exercised until the Legislature of this State shall make provision in the premises."

Since the ten states already members of the United States, including Virginia, accepted New York as a member, they assented to New York's condition subsequent. The next state to enter the United States was North Carolina. The last of the original thirteen states to enter the United States, Rhode Island and Providence Plantations, came into the United States on the identical verbatim condition subsequent as New York's. Rhode Island's condition subsequent is contained in her ratification of May 29, 1790.

Since the twelve states already members of the United States, including North Carolina, accepted Rhode Island as a member, they assented to Rhode Island's condition subsequent.

Since each of the thirty-five states to enter the United States subsequent to the original thirteen states came into the United States on a basis of perfect equality with each of the original thirteen states, the condition subsequent applicable to the original thirteen states applies to the

remaining thirty-five states just the same as all rights and powers possessed by each of the original thirteen states are possessed in equal amounts by each of the remaining thirty-five states.

B. A "Negative Admission" by the Solicitor General.

In the "Memorandum for the United States and the Federal Communications Commission in Opposition" to Petitioner's request for certiorari, the Solicitor General of the United States, the Honorable J. Lee Rankin, on page three thereof, makes the following revelation: "If the Commission's decision in April 1956 that petitioner was not a legally qualified candidate was wrong * * *" Ordinarily such phraseology would constitute an expression of doubt and uncertainty, but when such wordage is enunciated by the officer of the Department of Justice of the United States who filed a reply in opposition to the dispensing of justice to Petitioner such phraseology can only be construed as a negative or back-handed admission of the truth of Petitioner's assertions.

C. The Dissimilarity of the Daly and Barnes Cases.

In two separate but allied cases entitled *Frank A. Barnes v. National Broadcasting Company, Inc. et al.*, No. 202 Misc., and *Frank A. Barnes v. Columbia Broadcasting System, Inc.*, No. 226 Misc., both filed at the October, 1957 Term of this Court, Barnes appeals to this Court from judgments entered by the District Court of the United States for the Northern District of Illinois dismissing his suits for damages against the two aforesaid broadcasting networks based upon their refusals to afford him free and equal radio and television broadcast time.

However, these two cases are dissimilar to Petitioner's case entitled *Lar Daly v. United States of America and*

Federal Communications Commission, No. 237, filed at the October, 1957 Term of this Court, in that, unlike Petitioner, Barnes never became "a legally qualified candidate" and never was "certified by the duly constituted authorities" of one or more sovereign States.

II.

"OTHER SUBSTANTIAL GROUNDS AVAILABLE TO PETITIONER ALTHOUGH NOT PREVIOUSLY PRESENTED."

A. Analogy of FCC "Behavior Pattern" to Deceptive Debtor.

The procrastination and dilatory tactics characteristic of the treatment accorded Petitioner by the Federal Communications Commission and the judicial rewarding of the Commission for such behavior with the holding that Petitioner's grievance had become moot is analogous to repeated assurances by a debtor to his creditor of payment, amid protestations of good faith, until the statute of limitations governing the debt has run its full course.

B. Balancing of Scales Holding Duty and Right.

Rights have to be balanced with duties, privileges with obligations, advantages with responsibilities, benefits with burdens, just as in the law of evidence every rebuttable presumption is countered with a burden of proof. Every right has to be earned by the discharge of a corresponding duty. The right of receiving "equal opportunities" (free and equal radio and television broadcast time) under section 315 of the Communications Act of 1934, as amended, is dependent upon fulfilling the duty of obtaining a certification as "a legally qualified candidate" from at least one state secretary of state. Petitioner more than discharged

his duty (he obtained certificates from three state secretaries of state), but has been flagrantly denied the right which he earned and to which he is entitled under the law.

C. Supreme Case Asserting Doctrine of Supremacy of States in Election Matters.

The several individual States of the United States are supreme in all matters pertaining to elections held within their respective borders. The *supreme* case asserting this doctrine of the *supremacy* of the States in election matters is the case of *In re Green*, 134 U. S. 377, 379, 380, decided by the *Supreme* Court of the United States in 1889.

The opinion of the Court in that case, written by Mr. Justice Gray, declared that:

> "Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are * * * the people of the States when acting as electors of representatives in Congress * * * Congress has never undertaken to interfere with the manner of appointing electors, or, where (according to the now general usage) the mode of appointment prescribed by the law of the State is election by the people, to regulate the conduct of such election * * * but has left these matters to the control of the States."

D. Further Judicial Interpretations of the Term "Moot."

1. Petitioner's Case Is Not Moot.

The Court of Appeals of Ohio in 1953 in *Artists and Writers Association* v. *State Department of Liquor Control*, 96 Ohio App. 121, 125, 121 N. E. 2d 263, 265, stated that:

> "A question becomes 'moot' only when it is purely academic or abstract and any judgment which might be rendered thereon would in no way avail or be beneficial to any of the parties."

No reasonable man could deny that a judgment rendered on the question in the case at Bar in Petitioner's favor would be "beneficial" to him the next time he becomes a candidate for public office and "avail" to him the "equal opportunities" of which he was outrageously deprived.

The Court of Appeals of Maryland in 1943 in *United Brotherhood of Carpenters and Joiners of America, Local No. 101* v. *United Slate Tile and Composition Roofers, Damp and Waterproof Workers Association, Local No. 80,* 29 A. 2d 839, 840, declared that:

> "Inasmuch as the purpose of the writ of injunction is to prevent a nuisance or wrong, it is evident that, if it clearly appears to the court that there will not be a continuance thereof and the question has become moot, it is proper to refuse the writ."

No reasonable man could maintain in truthfulness that it could be "evident"—let alone "clearly evident"—to this Court that there will not be a repetition of the "wrong" visited upon Petitioner the next time he is a candidate for public office. In fact, it is "evident"—even "clearly evident"—from the "behavior pattern" set by the Federal Communications Commission in the instant case that the "wrong" visited upon Petitioner will be repeated the next time Petitioner, or any other citizen not a so-called "name" politician, becomes a candidate for public office.

2. Even If Petitioner's Case Is Moot, His Case Requires a Decision On Its Merits Because It Involves "Public Rights."

Even if the present case is moot (and this the Petitioner categorically denies and the contrary unqualifiedly affirms), his case requires a decision on its merits because it involves "public rights" and is "a matter of public interest."

The Supreme Court of Oklahoma in 1944 in *Payne* v. *Jones*, 193 Okl. 609, 611, 146 P. 2d 113, 116, stated that:

> "While it is a general rule in this jurisdiction, as

well as in the other jurisdictions, that the courts will not ordinarily decide moot questions, this rule applies generally to private rights, and not always as to them, but an exception is recognized in cases involving public rights."

The Supreme Court of the United States in 1947 in *United States* v. *United Mine Workers of America*, 330 U. S. 258, 91 L. Ed. 884, 913, 67 S. Ct. 677, 696, with Mr. Chief Justice Vinson as the organ of the Court, declared that: "Violations of an order are punishable as criminal contempt even though * * * the basic action has become moot."

The Supreme Court of the United States in 1911 in *Gompers* v. *Buck's Stove and Range Company*, 221 U. S. 418, 451, 55 L. Ed. 797, 810, 31 S. Ct. 492, 34 L. R. A. (N. S.) 874, 887, with Mr. Justice Lamar as the spokesman for the Court, stated that: "* * * the case * * * had become moot * * * of course without prejudice to the power and right of the court to punish for contempt by proper proceedings."

The Court of Appeals of Alabama in 1940 in *Willis* v. *Buchman*, 30 Ala. App. 33, 36, 199 So. 886, 889, declared that:

> "We believe it is the law * * * that 'as appellate courts do not sit to give opinions on moot questions or abstract propositions, the appeal or writ of error will be dismissed where no actual controversy exists between the parties at the time of the hearing, *unless the question involved is a matter of public interest*'." (The emphasized words were put in Italics by the Court of Appeals of Alabama.)

CONCLUSION.

For the foregoing reasons, Petitioner respectfully requests and urges this Honorable Court to grant certiorari or, in the alternative, to remand this case to the United States Court of Appeals for the Seventh Circuit for a decision on its merits.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

We hereby certify that the foregoing petition for rehearing "is presented in good faith and not for delay." We hereby further certify that the foregoing petition for rehearing "is restricted to the grounds * * * specified" in Rule 58, par. 2, of the Revised Rules of the Supreme Court of the United States.

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